

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1256

To be argued by
DAVID J. GOTTLIEB

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

RAMON AMPARO,

Defendant-Appellant.

B
P/s
Docket No. 77-1256

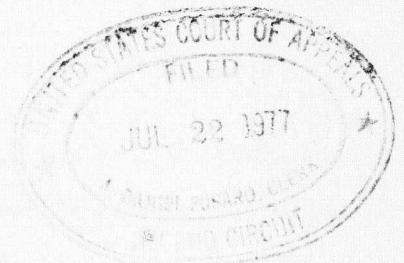
BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether this Court should examine the sealed exhibit of the district court transmitted to this Court and should permit counsel to examine the exhibit.

2. Whether the prosecutor erred by commenting that it was "not denied" that appellant had paid money to Sanchez and by informing the jurors that appellant could receive probation for his offense.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Charles E. Stewart) entered May 16, 1977, convicting appellant Ramon Amparo of one count of bribing a public official (18 U.S.C. §201(b)) and sentencing him to probation as a young adult offender (18 U.S.C. §5010(a)). By order dated July 2, 1977, this Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

By a one-count indictment filed November 8, 1976, appellant Ramon Amparo was charged with the bribery of an employee of the Department of Health, Education, and Welfare with the intent to influence the processing of applications for social security cards. Trial began on February 24, 1977; on March 4, 1977, a mistrial was declared when the jurors were unable to reach a verdict. On March 9, 1977, a superseding indictment* was filed, charging appellant with bribery and adding a count

*The indictments in this case are reproduced as B to the separate appendix to appellant's brief.

charging appellant with offering an illegal gratuity (18 U.S.C. §201(f)). Following denial of a defense motion to dismiss the indictment, trial began before Judge Stewart.

A. The Government Case

The Government's principal witness was Dorotea Sanchez, a clerk at the Social Security Administration office at 55 West 125th Street in Mahnattan (60-61*). Sanchez's position was as an account numbers clerk (61), the first person in the process of issuing social security cards. Sanchez's duties were described by Sanchez and Sarah Baker, a supervisor at the Social Security office, as follows: Before Sanchez was to accept an application, she was to require documentary proof of the applicant's age, identity, and citizenship; for non-citizen applicants, a social security application was to be accepted only upon proof that the applicant was legally in the United States; and for those non-citizens registering work-related cards, some proof the applicant's entitlement to work in the United States was required. For those applications accepted, the documentary proof was returned to the applicant and the card forwarded for further processing to the Bureau of Data Processing office in Baltimore, Maryland (23-28, 61-64). During the first five months of 1976, Sanchez processed the "bulk" of

*Numerals in parentheses refer to pages of the trial transcript.

applications transmitted through the 125th Street office (46-47).

Sanchez testified that her first contact with appellant was in February or March of 1976 when appellant, identifying himself as Raymond Gomez, phoned her at her office and told her he had filled out some applications which were on her desk, that he had moved his car and had sustained an accident. He requested that she hold the forms until he was able to return with the applications (65-66, 193).^{*} Although a written report signed by Sanchez indicated that appellant returned that afternoon (DX-C;^{**} 217-221), at trial Sanchez claimed that her next contact with appellant was one to two weeks later when he returned with a pregnant woman (67-68). As Sanchez was processing the card, appellant identified himself as the person who had called her some time previously (69). He asked to speak with her and requested her home telephone number for that purpose (70, 90). Although appellant offered no explanation as

^{*}Sanchez's claim that this was her first contact with appellant was brought into question in light of certain evidence introduced at trial. Thus, it was revealed that if appellant had attempted to dial the 125th Street office on the basis of the number listed in the Manhattan telephone directory, he would actually have been connected to a telephone center in New Jersey rather than to the 125th Street office (589-591, 602-604). Sanchez's claim was further called into question when, on cross-examination, she identified a piece of paper written by her and given to appellant which contained her office phone number (201, 210-211). However, Sanchez did not change her story that the phone call was her first contact with appellant.

^{**}"DX" designates a defense exhibit; "GX", a Government exhibit.

to why he needed Sanchez's home phone number, Sanchez concluded that he seemed to need help, and so gave him her home phone and address (71, 90-93).

Some time after April 20, 1976, following a couple of telephone calls, appellant visited Sanchez at her home (96-97, 99). When Sanchez asked what she could do to help, appellant requested her aid to do "something" for people who were without residence cards. Sanchez stated that documentary proof was necessary before such people could be issued Social Security cards. Appellant, however, claimed it "could be done" and that other Social Security employees had done "it" for him. He allegedly offered Sanchez \$20 for the processing of each Social Security card application. Sanchez, allegedly desirous of finding out who the "other" employees were, neither accepted nor rejected the offer (99-102).

Upon her return to the office, Sanchez failed to report the offer to her immediate supervisor (224), but instead spoke briefly a day or two later in a hallway with Charles Brown, the office district manager (103, 337). While Sanchez claimed that she told Brown of being approached by appellant and about their meeting at her house (103), Brown testified that, so far as he could recall, Sanchez merely vaguely mentioned that she had a problem in the account number section concerning someone visiting the office, and said nothing about a bribe or a meeting at her house (338-339, 368-369).

On approximately May 25, 1976, appellant came to Sanchez's

office and gave her three Social Security applications, none of which was supported by documentary evidence. He offered Sanchez money for the applications, but she put off his offer. Three days later, Sanchez went to Brown, informed him of the offer, and handed him the applications (see 104-110, 341-343; GX-5 - 8). A report of the incident was prepared (DX-C), and Sanchez was told to report any future contacts (342). Neither in the report of the incident nor in her conversation with Brown did Sanchez mention her asserted reason for her initial cooperation with appellant -- his allegation that there were other persons involved in the accepting of unverified applications in the Social Security Administration (DX-C; 390-391, 393).

On Friday, June 18, 1976, appellant called Sanchez and arranged to meet her outside her office after work. Appellant drove her home and in the course of the ride allegedly gave her a \$20 bill, asked a number of questions concerning Social Security procedures, and said he was getting cards from other offices (111-115, 277).* The following Tuesday, Sanchez allegedly gave the \$20 bill to Brown (116, 346; GX-9 -10). She also prepared a report of the incident, which she signed (346-

*Sanchez had not mentioned this last bit of information during the previous trial (277).

348). The report is in evidence as Defense Exhibit D.*

By July these matters had come to the attention of the FBI, and Sanchez met with a number of agents, including William Lynch (415-417). On July 8, Sanchez met again with appellant in the building lobby, where appellant allegedly gave Sanchez three applications which she later turned over to Agent Lynch (GX-11 — 13; 121-125, 417-422). At her next meeting with appellant, on August 2, 1976, Sanchez was outfitted with a recording device (424-426). During the meeting, appellant handed Sanchez seven more applications and a \$20 bill (136-139). In the course of the conversation appellant, unaware he was being taped, said he had received cards processed through Sanchez for Alberto Lopez and one "Jose" (GX-27 at 4-5; 9-11).** The Social Security application for Alberto Lopez,

*During cross-examination, Sanchez was asked whether there were other reports or records she might have prepared of her meetings with appellant. Sanchez stated that she had indeed kept a file with memoranda covering her meetings with appellant but had destroyed them following appellant's arrest and prior to trial, with "everything pertaining to this" (288, 294). Sanchez explained the destruction of her notes as occurring at a conversation with an FBI agent -- William Lynch -- who, she alleged, informed her that after appellant's arrest she might not have to testify or see appellant, but just point him out (238, 314). Agent Lynch testified that his only discussions with reference to Sanchez's possible testimony was after appellant's arrest when he told Sanchez not to worry, that it was all over (501-502).

**The tape of the conversation (GX-26) was played for the jury (139-140), with a transcript of the tape (GX-27) admitted into evidence.

addressed to appellant's home, was submitted on April 1, 1976; a card for Jose Cuevas, also addressed to appellant's home, was submitted April 7, 1976 (see GX-30; DX-E). Sanchez, who knew, of course, that the conversation was being taped, denied knowledge of the applications, and at trial denied processing the Lopez or Cuevas cards submitted well before she claimed she had agreed to accept applications from appellant (see 150-154, 322-323).

Sanchez met again with appellant on August 6, 1976, again outfitted with a recorder. Appellant gave her two more applications and a duplicate Social Security card for her to process (GX-31-34; 161-164, 441-444). During this conversation, as well as the August 2 conversation, there was language in which appellant seemed to admit paying Sanchez for processing the cards. Sanchez's last meeting with appellant occurred on August 23 when, she alleged, appellant was in the company of three or four individuals whose applications he was helping process (169-176). On September 10, 1976, following a phone call from Sanchez, appellant was arrested without incident in the lobby of the Social Security building. At the time of his arrest, appellant possessed three Social Security applications (GX-36-38; 445-447).

Prior to cross-examination of Sanchez, defense counsel was supplied with notes from FBI agents as 3500 material. A number of pages of the notebooks were withheld by the Government, on the ground that the materials withheld did not con-

stitute producible documents under 18 U.S.C. §3500. Counsel protested and asked that the court examine the materials in camera (234). Judge Stewart examined the materials, and during Sanchez's cross-examination, announced his view that none of the materials submitted in camera was §3500 material, nor would they be helpful to the defense (268). Still later the court announced that it had completed its review of the materials submitted in camera and had determined that the materials were not §3500 material. The court stated that it would return the pages to the Government. However, defense counsel moved that they be made a court exhibit, and the court agreed (311). Following the trial, the exhibit was marked as Court Exhibit 8 to preserve it for appeal (880-881).*

In addition to the testimony of Sanchez, Baker, Brown, and Lynch, the Government presented the testimony of Frank Johnson, a "Supervisor Investigator" with the Immigration and Naturalization Service, who testified that, on the basis of records at the Immigration and Naturalization Service, it was his conclusion that the Social Security applications submitted by appellant were for people who were aliens illegally in the United States (see 520, 525-537).

*On July 20, 1977, the district court signed an order transmitting the sealed exhibit to this Court.

B. The Defense Case

Among the defense witnesses was Dena Kohn, a Spanish-English interpreter (634). Ms. Kohn, who had translated for appellant prior to and during trial (636),* testified that it was her belief, based upon her conversations with appellant and her analysis of the tape recordings admitted in evidence, that appellant had "limited understanding" of certain portions of the recordings, "but in most instances did not understand what was happening" (648). Kohn noted that appellant has only a "limited ability" to understand English, the language used in most of the taped conversations between appellant and Sanchez (646-647; 635).

Myreia Concepcion and Nancy Amparo, appellant's mother and sister-in-law, respectively, testified that they had frequently received phone calls for appellant from a Miss Sanchez as early as March 1976, frequently in April, and continuing until August 1976 (620-627).

*The Government failed to object to Kohn's testimony in these areas, specifically on the ground that she was serving as the court interpreter (634-636, 648).

C. The Prosecutor's Rebuttal Summation*

The prosecutor's rebuttal summation began with an attempt to rehabilitate Ms. Sanchez, whose credibility was the focus of the defense summation. In the course of summation, the Assistant U.S. Attorney stated:

Mr. Chase in his cross-examination suggested as to her misconduct. No reason has been suggested for that and there is no evidence that in fact she did lie. It tempts me to say, ladies and gentlemen, if you disbelieve Mrs. Sanchez on the basis of no evidence that she has lied, go out and acquit this defendant in two minutes. I'm only tempted to say that, ladies and gentlemen, because the fact also is that there is plenty of evidence, quite apart from Mrs. Sanchez, although, as I say, there has been no real doubt cast on her testimony. The question is did the defendant give Mrs. Sanchez money with the intent to influence her in getting the forms and knowing that he was doing something wrong, had a generally bad motive. As for giving her money, it is not denied. How could it be?

MR. CHASE: I must protest. By his plea of not guilty the defendant has denied each and every element of the crime, as Your Honor has instructed.

THE COURT: You may go ahead.

MR. PATTERSON: There has been no evidence introduced by the defense to contradict the fact that the money was given. As to the connection between the money and the applications, there is abundant evidence -- no other reason has been suggested, at least not with any --

(821).

*The complete text of the prosecutor's rebuttal summation is reproduced at D of appellant's separate appendix.

In closing his summation, the Assistant U.S. Attorney stated:

At the outset of this case you took an oath and under that oath you have a serious and solemn responsibility, a duty to decide this case of the defendant's guilt on all of the evidence. You have a duty to do without fear or favor, bias or prejudice to anyone, and not on the basis of sympathy for the defendant, and, by the way, the subject of punishment is no concern of yours. It is the concern of Judge Stewart who could give the maximum sentence and who could give probation and let the defendant --

(826-827).

Defense counsel objected, noting that "this subject is entirely outside the consideration of the jury." Without sustaining the objection, the judge repeated that it was his job to determine the punishment meted out for the offense (827).

The jurors began their deliberations on the afternoon of March 23, 1977. The following day, at 12:05 p.m., the jurors announced that they had reached a verdict finding appellant guilty of bribery (879). Having so found, the jury did not consider the lesser-included count of offering an unlawful gratuity, and the count was dismissed after trial. This appeal followed.

ARGUMENT

Point I

THIS COURT SHOULD DETERMINE WHETHER
THE MATERIALS EXAMINED IN CAMERA BY
THE COURT BELOW SHOULD HAVE BEEN PRO-
DUCED AS JENCKS ACT MATERIAL.

Title 18 U.S.C. §3500 provides that where any statement contains matters not relating to the subject matter of the witness' testimony, the statement shall be turned over to a judge for an in camera inspection. 18 U.S.C. §3500(c).

Here, the defense received FBI interview reports with a number of pages missing. Upon making this discovery, counsel protested and argued that at least an in camera inspection be held. Such an inspection was made by the trial court. After determining that the sealed materials were not §3500 material, the court first suggested that the materials be returned to the Government. The defense objected, however, urging that the records be maintained as a court exhibit. The court agreed, and after trial, the sealed exhibit was marked. On July 20, 1977, an order of Judge Stewart was filed directing that the sealed record be transmitted for examination by this Court.

This procedure is in accord with the rules outlined in

18 U.S.C. §3500(c) for review of a district court determination under that section that materials need not be disclosed:

If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the Court for the purpose of determining the correctness of the ruling of the trial judge.

While the district court's ruling concerning producibility is entitled to some weight (see Campbell v. United States, 373 U.S. 487, 493-497 (1963); United States v. Cruz, 478 F.2d 408, 412-413 (5th Cir. 1973)), as §3500 obviously contemplates, provision is made for appellate review of such decisions. Campbell v. United States, *supra*.

Such review is necessary, given the crucial importance of §3500 material to the conduct of an adequate defense. As the Supreme Court, in the case whose ultimate result was the promulgation of 18 U.S.C. §3500, explained:

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his remarks is not the only test of inconsistency. The omission from the report of facts related at trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Jencks v. United States, 353 U.S. 657, 667 (1957).

Of course, at the present state of the record, appellate counsel is completely unable to make any judgment concerning the nature or importance of the withheld materials. Accordingly, we submit along with this brief a motion to permit counsel to examine the sealed materials and to file a supplemental, sealed brief to this Court explaining our position on the producibility and importance of the materials. In the alternative, we urge that this Court examine the materials and determine the propriety of the district court's conclusion.

18 U.S.C. §3500(c).

Point II

THE PROSECUTOR ERRED BY COMMENTING THAT IT WAS "NOT DENIED" THAT APPELLANT HAD PAID MONEY TO SANCHEZ AND BY INFORMING THE JURORS THAT APPELLANT COULD RECEIVE PROBATION FOR HIS OFFENSE.

The examination and argument in most of this case, by both prosecution and defense, was focused on the evidence and strictly avoided epithets and ad hominem arguments. However, despite the fact that this case fails in any way to present the kind of pervasive misconduct characterized by such cases as United States v. Drummond, 481 F.2d 62 (2d Cir. 1973), we most respectfully submit that two of the prosecutor's comments in his rebuttal summation were erroneous. Because of the closeness of this case -- evidenced by a mistrial and lengthy jury deliberations as well as the many conflicts in Sanchez's testimony -- we believe the errors merit this Court's attention.

The Assistant U.S. Attorney erred first in summation by his argument that it was "not denied" that appellant had paid money to Sanchez. In the first place, as counsel correctly pointed out in his objection, appellant, by his not guilty plea, had denied every element of the crime. Worse still, since the only defense witness in a position to make a denial was the defendant himself, it is probable that the jury "would naturally and necessarily construe [this argument] to be directed to the failure of the defendant to testify." United States v.

Armedo-Sarmiento, 545 F.2d 785, 793 (2d Cir. 1976), cert. denied, 97 S.Ct. 1330, 1331 (1977); United States ex rel. Leak v. Follette, 418 F.2d 1266, 1269 (2d Cir. 1969), cert. denied, 397 U.S. 1050 (1970). There is an important difference between merely informing the jury, as the prosecutor did on a number of occasions in the summation, that his evidence is uncontradicted (see United States v. Rodriguez, Doc. No. 76-1587, slip op. 3429, 3434 (2d Cir., May 11, 1977); United States v. Rodriguez, 545 F.2d 829, 832 (2d Cir. 1976)) and chastising the defendant for failing to make a "denial." And while the Assistant U.S. Attorney eventually rephrased his argument merely to state that the evidence on this issue of whether appellant had paid Sanchez was "uncontradicted," it is just as likely that the jurors drew an improper meaning from this phrase in light of the language about denials as it is that the comments that the evidence was "uncontradicted" cured the error.*

It was also improper for the Assistant U.S. Attorney to have stated that punishment was of no concern to the jury, since

[it] is the concern of Judge Stewart who could give the maximum sentence and who could give probation and let the defendant --

(826-827).

*The court's charge, coming far later in the day, failed to cure the prejudice of this remark, particularly in light of the court's failure to sustain the defense objection. Coleman v. Denno, 223 F.Supp. 938, 943-944 (S.D.N.Y. 1963), affirmed, 330 F.2d 441 (2d Cir.), cert. denied, 377 U.S. 1003 (1974).

The prosecutor was right in stating that punishment was of no concern to the jurors. See, e.g., 1 Devitt & Blackmar, FEDERAL JURY INSTRUCTIONS §18.02 (and cases cited therein) (3d ed. 1977). That being the case, there was simply no proper use for the knowledge given to the jury by the Assistant U.S. Attorney that probation was a possible sentence. There was, however, a possible misuse, for knowledge of this lenient option open to the court may have lessened the jurors' perception of the importance of their deliberations, and the seriousness with which they approached their task. Since the perception may well have made a verdict of guilty more likely, the comments were prejudicial as well. The jury simply should not be told of the range of punishments available for an offense. United States v. McCracken, 488 F.2d 406, 425 (5th Cir. 1974); United States v. Matthews, 335 F.Supp. 157, 165 (W.D.Pa. 1971), appeal dismissed, 462 F.2d 182 (3d Cir.), cert. denied, 409 U.S. 892 (1972). And it is notable that the Assistant U.S. Attorney's comment specifically informed the jury only of one of the lenient options -- probation -- remaining vague as to the maximum penalty possible. The comment was error, to which appropriate objection was taken.*

*It cannot be argued that this statement was fair reply to the defense summation. In his closing argument, defense counsel focused on the evidence in the case, never specified a minimum or maximum sentence to be faced, and did not turn his summation in any sense into a plea for sympathy. The only arguments even remotely tangential to this issue were his statements that the charges were serious federal felonies (798, 744, 761, 785) and that where individual liberty was at stake, no standard of proof other than reasonable doubt would suffice (776, 800).

The impact of these statements must be measured in light of the closeness of this case. Not only did the jury deliberations last a significant period of time, but the first trial ended in a mistrial when the jury was unable to reach agreement. Sanchez's memory was shown to be faulty on many occasions, and a substantial question was raised as to whether she may have been involved in possessing the applications prior to the time she reported them to her superiors. Comments having the effect of focusing the jurors' attention away from the evidence and toward appellant's failure to testify or lessening the importance of the jurors' deliberations may well have tipped the balance. Accordingly, a new trial should be granted.

CONCLUSION

For the foregoing reasons, this Court should examine the sealed exhibits to determine the correctness of the district court's determination; in any event, a new trial should be ordered.

Respectfully submitted,

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